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In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LEWIS B. MAYTAG, ALTERNATE EXECUTOR OF THE ESTATE OF DENA B. MAYTAG, DECEASED

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ORA B. MAYTAG, FRED MAYTAG II, AND MARY LOUISE MAYTAG MCCAHILL, EXECUTORS OF THE ESTATE OF E. H. MAYTAG, DECEASED

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit entered in these cases on January 20, 1942.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 29–65) is not officially reported. The opinion of the Circuit Court of Appeals (R. 438–450) is reported at 125 F. (2d) 55.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on January 20, 1942 (R. 450–451). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In determining for estate and gift tax purposes the value of large blocks of stock regularly traded in upon the New York Stock Exchange, the Board of Tax Appeals took into consideration the potential reduction in the market price which would result from the artificially depressed condition of the market if the blocks of stock were thrown upon the market at one time. The question presented is whether this potential effect may properly be considered as a factor in valuing the stock.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved may be found in the Appendix, *infra,* pp. 15–22.

STATEMENT

These two consolidated (R. 125, 429–430) proceedings involve two separate liabilities, one for an

estate tax deficiency asserted against the estate of Dena B. Maytag, of which E. H. Maytag was then the executor, and the other for a gift tax deficiency for the year 1934 asserted against E. H. Maytag individually (R. 13–18, 23–27).[1] The cases as finally submitted to the Board (R. 30) involved only two issues: (1) the fair market value on January 18, 1934, the date of death of Dena B. Maytag, of the 133,859 shares of common stock of the Maytag Company which were a part of her estate, and (2) the fair market value on December 15, 1934, of the 400,000 shares of the same stock which were on that date transferred, by gift, by E. H. Maytag under four separate trusts of 100,000 shares each, for the benefit of his four children.

The facts pertinent to the question presented here, as found by the Board of Tax Appeals (R. 30–54), may be summarized as follows:

On the two critical dates, the date of death, January 18, 1934, and the date of the gifts, December 15, 1934, there was outstanding a total of 1,617,-922½ shares of the common stock of the Maytag Company, in addition to substantial amounts of two classes of preferred stock (R. 30, 32). The three classes of the stock were listed on the New York Stock Exchange (R. 49). At the dates here

[1] E. H. Maytag died after the cases had been decided by the Board, and his executors and the alternate executor of the estate of Dena B. Maytag were substituted as respondents on review in the court below (R. 433–436).

in issue, members of the Maytag family owned about 85% of all of the common stock outstanding (R. 49–50).

The trading in the common stock on the New York Stock Exchange for the years 1933, 1934, and 1935 amounted to 88,000 shares, 106,600 shares, and 194,300 shares, respectively (R. 50–51).[2]

In the estate tax return filed for the estate of Dena B. Maytag, the 133,859 shares of Maytag common stock owned by the decedent at her death were reported at a value of $2.50 a share. In the gift tax return of E. H. Maytag for the year 1934, the value of the 400,000 shares of Maytag common stock transferred under the four trusts was also stated to be $2.50 a share. (R. 54.)

The Commissioner determined a deficiency of $76,568.65 in respect of the estate tax, and of $120,666 in respect of the gift tax (R. 30). In his audits of the two returns, he determined that the 133,859 shares had a value of $4.75 a share on January 18, 1934, and that the 400,000 shares had a value of $4.5625 a share as of December 15, 1934 (R. 13–18, 23–27, 54). The $4.75 value determined by the Commissioner represented the mean between the bid and asked prices of January 18 on the New York Stock Exchange, no sales having

[2] The Board's findings included a tabulation of sales by months, with the prevailing high and low prices (R. 50–51), and a tabulation of the daily trading in the stock for the months of January and December 1934, showing the amount of sales, and bid and asked and sales prices (R. 51–52).

been recorded on the Exchange on that date, while the $4.5625 value determined by the Commissioner was the mean between the high and low sales prices recorded on the Exchange on December 15, 1934 (R. 54).

In their appeals to the Board, the taxpayers contended that the value of the stock on January 18 was between $1.50 and $2 a share and that the value on December 15 was not in excess of $2.50 a share. They asserted that the Commissioner's valuations were erroneous because he had failed to take into consideration such factors as intrinsic, liquidating, and earning values and, in particular, the large quantity of stock to be valued as compared with the small volume of trading on the Exchange, and the difficulty of disposing of any block of the size involved within a reasonable period of time at a price approximating market quotations. (R. 54–55.) The Commissioner, on the other hand, contended that the correct concept of "value" or "fair market value" was (R. 56) "the price at which the property in question would change hands, assuming a willing seller and a willing buyer, i. e., assuming an increase in demand equal to the supply or the quantity of the property in question."

The Board, after making detailed findings of fact concerning the industrial and financial history and operations of the Maytag Company (R. 30–49), held that "the effect of placing a large

block of security in the market at one time 'is a factor of great importance' " in determining value (R. 56). Accordingly it reviewed, *inter alia,* the evidence adduced by the taxpayers through three expert witnesses who testified that in their opinion the price of the Maytag common stock would have been materially depressed by an attempt to sell blocks of the size here involved (R. 57).[3] The Board then adverted to the evidence relating to the Maytag Company's record of earnings, its business, its intrinsic value, and related factors (R. 57–64). Finally, the Board stated its serious doubts "that the numbers of shares of stock here involved could have been sold within a reasonable time" after the valuation date "without affecting the prevailing market price" (R. 64). It concluded "upon all the evidence" that the 133,859 shares had a value of $3.10 a share on January 18, and that the 400,000 shares had a value of $3.80 a share on December 15, 1934 (R. 64).[4]

---

[3] In general, their testimony rested upon considerations as to the size of the blocks involved and speculations as to the effect of the sale of such large blocks (R. 146–147, 152, 154–155, 160, 163, 167, 171–174, 175, 179, 182–187, 187–189); their opinions as to value were based upon the assumption of a willing seller without a willing buyer (R. 160, 174, 191). Their testimony was received over objections, made at various times during the course of its presentation, by counsel for the Commissioner, who, at its conclusion, unsuccessfully moved to have it stricken (R. 192–194; see also R. 369).

[4] The Board also stated separately as findings these conclusions as to the value of the stock (R. 54).

Accordingly, the Board entered decisions reducing the deficiency in the estate tax to $17,704.82, and in the gift tax to $71,783 (R. 65–66). Upon appeal by the Commissioner, the court below held that the size of a block of stock and the effect of its disposition in the market are factors which may be, and were, properly considered in its valuation for gift and estate tax purposes (R. 449); it therefore affirmed the decision of the Board of Tax Appeals (R. 450).

REASONS FOR GRANTING THE WRITS

The ultimate question involved in these cases is one of fact, the value for gift and estate tax purposes of stock, the determination of which by the Board of Tax Appeals does not normally warrant further review by this Court. At the threshold of an inquiry concerning valuation, however, the problem of what factors and criteria may be considered must be met. As the court below recognized (R. 448), that problem is a question of law reviewable by an appellate court. See *Powers* v. *Commissioner,* 312 U. S. 259, 260.

The sole basic issue which remains in these cases is the validity, for valuation purposes, of the so-called "blockage" theory.[5] The rationale of this

[5] Admittedly, the trading in Maytag common on the Exchange was continuous and substantial (R. 447); there was no evidence that the market was affected by fraud or manipulation, or that the quoted transactions were fictitious (R. 447); or that the prices prevailing on the Exchange did not represent the fair market value of the amounts of stock traded in (R. 159–160, 167, 174, 191; cf. R. 211–213, 268, 288–289, 314).

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theory is that a large block of stock cannot ordinarily be marketed as readily as a few shares, and that if there is only a limited market for stock, or if the number of shares sought to be valued is large in proportion to the number of shares normally traded in publicly, the offering of a large block of stock would depress the market and consequently reduce the price which it would bring. If the blockage theory is, therefore, applied, the value of each unit of a large block of stock would be lower than the prevailing market price of the stock. The amount of the reduction would, as here, be based upon opinion evidence relating to the depressing effect which the large blocks of stock would have on the market. The Board of Tax Appeals plainly adopted and applied the blockage theory in considering, for valuation purposes, the factor of the effect of placing the stock on the market (R. 56, 57, 64). The court below similarly accepted the issue as thus posed and held that the Board could properly apply the blockage theory (R. 448).

The ultimate place of the blockage theory in the field of valuation presents a problem of great importance and frequent recurrence in the administration of the estate and gift tax laws, and, as the court below expressly recognized (R. ——), one which has not yet been, but should be, authoritatively settled by this Court.

1. The question whether the valuation for estate and gift tax purposes of publicly and regularly

traded stock may properly be reduced below the fair market value as represented by its market price solely because a large block of stock is involved, the immediate offer of which might depress the prevailing market price, must necessarily be presented in virtually every case where a wealthy person dies or makes a large gift. The well-to-do frequently own blocks of stock of a size which, particularly at present when the sales on the market are small, the market may not at any given moment be able to absorb at the prevailing price. A conservative estimate of the amount of taxes, exclusive of interest, turning on the validity of the blockage theory, is not less than $7,000,000 involved in 445 pending cases.[6]

2. Although several circuit courts of appeals have held that the blockage theory could validly be applied in the valuation of stock for estate and gift tax purposes,[7] and none has expressly held to the contrary, considerable confusion concerning its ultimate place in the field exists. See *Phipps* v. *Commissioner,* decided March 23, 1942, by the Circuit Court of Appeals for the Tenth Circuit, not

[6] The Commissioner of Internal Revenue has so stated in a recent letter to the Department of Justice in response to an inquiry concerning the amount of taxes involved and the number of cases pending in the Bureau and before the Board of Tax Appeals.

[7] *Helvering* v. *Safe Deposit & Trust Co. of Baltimore* 95 F. (2d) 806 (C. C. A. 4th); *Helvering* v. *Kimberly*, 97 F. (2d) 433 (C. C. A. 4th); *Commissioner* v. *Shattuck*, 97 F. (2d) 790 (C. C. A. 7th), and cases cited by the court below (R. 450).

yet officially reported, but may be found in 1942 Prentice-Hall, Vol. 4, par. 62,576. Thus, a number of courts have held that the failure to apply the blockage theory, in circumstances not substantially different from those presented here, is not error and that valuation based on market price is substantially supported. *Phipps* v. *Commissioner, supra; Gamble* v. *Commissioner,* 101 F. (2d) 565, 567 (C. C. A. 6th), certiorari denied, 306 U. S. 664, *Roth* v. *Wardell,* 77 F. (2d) 124, 125 (C. C. A. 9th), *Richardson* v. *Helvering,* 80 F. (2d) 548, 552 (App. D. C.).[8] While perhaps no square conflict exists between these cases and the decision of the court below, it is submitted that they cannot be reconciled in principle. If the blockage theory is valid at all, it would seem that it must be applied in all cases where the block of stock is sufficiently large to make it likely that its immediate disposi-

[8] The result of these cases is in accord with the Treasury regulations. As early as 1919, the regulations provided for the valuing of listed stocks according to "the mean between the highest and the lowest sale price" on the market on the valuation date. Treasury Regulations 37 (1919 Ed.), Art. 15 (2). As later amplified, the regulations provide for "unit" valuation, i. e., valuation upon the basis of each unit of the property. Treasury Regulations 80 (1934 Ed.), Art. 13 (1); Treasury Regulations 79 (1936 Ed.), Art. 19 (1). Appendix A, *infra.* An additional statement in these editions that the size of the holdings or gifts would not be considered was omitted in 1939 (T. D. 4902, 1939–1 Cum. Bull. 325, and T. D. 4901, 1939–1 Cum. Bull. 341, *infra,* Appendix, p. 22) after its validity had been questioned in the cases cited *supra,* p. 9, n. 7.

tion would depress the market. Failure to consider this factor and reduce the valuation below the market price would, therefore, be error, yet in the cases cited no error was found.

3. Adoption of the blockage theory in cases such as this is inconsistent with familiar principles of valuation in comparable situations. Concededly (R. 56), the task before the Board of Tax Appeals was to ascertain the "fair market value" of the stock on the critical dates. It is well established that "fair market value" is the price at which property would change hands in a transaction between a willing buyer and a willing seller. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123–124; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 155–156. Consequently, where the property to be valued is regularly traded in on an established market, the prices there prevailing are normally determinative of the fair market value of the property. *United States* v. *New River Collieries*, 262 U. S. 341, 345; *Standard Oil Co.* v. *Southern Pacific Co.*, *supra*, pp. 155, 158; *Whitlow* v. *Commissioner*, 82 F. (2d) 569, 572 (C. C. A. 8th); *Helvering* v. *Kendrick Coal & Dry Dock Co.*, 72 F. (2d) 330, 333 (C. C. A. 8th), certiorari denied, 294 U. S. 716.[9]

[9] See also *Commissioner* v. *Robertson*, 75 F. (2d) 540, 541–542 (C. C. A. 6th), certiorari denied, 295 U. S. 763; *Hazeltine Corp.* v. *Commissioner*, 89 F. (2d) 513, 518–519 (C. C. A. 3d); *W. T. Grant Co.* v. *Duggan*, 94 F. (2d) 859, 861–862 (C. C. A. 2d); *Union Nat. Bank of Pittsburgh* v. *Driscoll*, 32 F. Supp. 661, 662 (W. D. Pa.).

No different rule should be applied simply because the block of stock to be valued may be deemed, on the basis of expert opinion, to be greater than the market could absorb within a short period of time.[10] For the test of value for tax purposes is not the price at which property can immediately be liquidated, but the price at which the property would change hands between a willing buyer and a willing seller. In valuing a large block of stock, therefore, it must be assumed that there is a demand for that stock equivalent to its supply. But the very nature of the blockage theory as here approved by the court below presupposes the existence of an artificially depressed market rather than the normal market where the demand is equivalent to the supply and where both the sellers and the buyers are "willing."

Any other rule would result in the anomaly that two shares of stock, each of which represents the same interest in the same corporate enterprise, may on the same date have different values for tax purposes simply because they are owned by different persons. This would seem to be violative of the broad basic intent of Congress to tax uniformly and at rates graduated according to the amount

[10] That, in any event, such an inquiry may be entirely hypothetical is demonstrated by the instant case, where, as the court below recognized (R. —), there is no showing whatsoever that the changes in ownership occasioned by the death and the transfers in trust resulted in any actual increase in the supply of shares on the market.

of the estate or gift. See Section 301 (a) of the Revenue Act of 1926; Section 401 (a) and (b) and Section 502 of the Revenue Act of 1932, Section 405 of the Revenue Act of 1934.

Ex hypothesi, the blockage theory becomes operative only where the number of shares of stock is so large that its immediate public disposition would depress the market. It inures to the benefit, therefore, exclusively of the well-to-do with large holdings. A person transferring a small number of shares would be taxed at a higher valuation than the one transferring a large lot of shares, and this although the shares are otherwise identical and the transfers occur simultaneously.[11]

4. Respondents may urge, in opposition to this petition, that the Board's valuation finding was made "upon all the evidence" (R. 64), and that there is substantial evidence to support this finding even apart from the blockage theory. It is clear from the Board's opinion, however, that the Board gave great weight to the blockage theory; indeed, in view of its observation with respect to the "splendid record" of the company (R. 63), its finding of a value considerably below the market price

[11] The result is, moreover, inconsistent with the standard business practice of banks, trust companies, insurance companies, and similar institutions to make no discount in valuing security portfolios, based on the size of the block (R. 41, 162, 175, 318). Valuation of property for tax purposes should conform as nearly as possible to standard business practices. *Maass* v. *Higgins*, 312 U. S. 443, 449.

is probably attributable primarily to that theory. In any event if, as we contend, consideration of the blockage theory was error, the Commissioner seems clearly entitled to have the case remanded to the Board for a redetermination of value upon the basis of only the legally relevant and competent evidence.

It is, we believe, appropriate to point out that in almost every "blockage" case which arises, other evidence than that with respect to blockage is introduced and the ultimate valuation finding is normally made upon the basis of the entire record. If the existence of such other evidence should preclude review of the blockage theory in this case, it seems unlikely that the Commissioner could ever secure an authoritative ruling from this Court upon this highly important fiscal problem.

CONCLUSION

It is respectfully submitted that this petition for writs of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States;

* * * * *

[Then follows a schedule of percentages, graduated according to the amount of the net estate.]

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the prop-

erty is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

[Then follows schedule.]

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

Treasury Regulations 79 (1936 Ed.), relating to gift tax under the Revenue Act of 1932, as amended:

ART. 19. *Valuation of property*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any

compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price or by an estimate of what a whole block or aggregate would fetch if placed upon the market at one and the same time. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

* * *

(3) *Stocks and bonds.*—The value at the date of the gift in the case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

The value of stocks and bonds listed upon a stock exchange shall be obtained by taking the mean between the highest and lowest quoted selling prices upon the date of the gift. If the gift was made on Sunday or on a legal holiday, the transactions of the next previous business day will govern. If there were no sales on the date of the gift, the value shall be determined by taking the mean between the highest and lowest sales upon the nearest date either before or after the date of the gift, if within a reasonable period thereof. If the security was listed upon more than one exchange, the records of the exchange where the security was principally dealt in should be employed. In valuing listed stocks and bonds the donor should observe care to consult accurate records to obtain values as of the date of the gift.

If the securities are not listed upon an exchange, but are dealt in through brokers, or have a market, the value should be determined by taking the mean between the highest and lowest selling prices as of the date of the gift, or, if there were no sale on that date, of the nearest date either before or after the date of the gift upon which sales were made, if within a reasonable period. If quotations are obtained from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing companies, the donor should preserve in his files the letters furnishing such quotations, or evidence of sale, for inspection when the return is verified by an investigating officer.

If securities are quoted on a bona fide bid and asked basis, and actual sales are not available, the mean between the bid and asked prices on the date of the gift, or if not quoted as of the date of the gift, the mean between such prices on the nearest date thereto within a reasonable time, will be accepted as the value.

If the value of a security cannot be determined by sales, or from bid and asked prices, as prescribed in the preceding provisions of this subdivision, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon

which the donor bases his valuation should be submitted with the return.

In exceptional cases in which it is established by clear and convincing evidence that the value per bond or share of any security determined upon the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, other relevant facts and elements of value will be considered in determining the fair market value. The size of the gift of any security is not a relevant factor and will not be considered in such determination.[12]

* * * * *

Treasury Regulations 80 (1934 Ed.), promulgated under the Revenue Acts of 1926 and 1932, as amended:

ART. 13. *Valuations*—(1) *General.*—The value of all property includible in the gross estate is the fair market value thereof at the time of decedent's death. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price or by an estimate of what a whole block or aggregate would fetch if placed upon the market at one and the same time. Such value is to be determined by ascertaining as a basis the fair market value at the time of the decedent's death of each unit

[12] This last sentence was dropped from the revision contained in T. D. 4901, 1939–1 Cum. Bull. 341, in which the substance of the other parts of the article quoted was restated in slightly different form.

of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the decedent's death should be considered in every case. * * *

(3) *Stocks and bonds.*—The value at the date of the decedent's death in the case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on the date of death.

The value of stocks and bonds listed upon a stock exchange shall be obtained by taking the mean between the highest and lowest quoted selling prices upon the date of death. If the decedent died on a Sunday or a legal holiday, the transactions of the next previous business day will govern. If there were no sales on the date of death, the value shall be determined by taking the mean between the highest and lowest sales upon the nearest date either before or after the date of death, if within a reasonable period thereof. If the security was listed upon more than one exchange, the records of the exchange where the security is principally dealt in should be employed. In valuing listed stocks and bonds the executor should observe care to consult accurate records to obtain values as of the date of death.

If the securities are not listed upon an exchange, but are dealt in through brokers, or have a market, the value shall be determined by taking the mean between the highest and lowest selling prices as of the date of death, or, if there were no sales on that

date, of the nearest date either before or after the date of death upon which sales were made, if within a reasonable period. If quotations are obtained from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing companies, the executor should preserve in his files the letters furnishing such quotations or evidence of sale for inspection when the return is verified by an investigating officer.

In the case securities are quoted on a bona fide bid and asked basis, and actual sales are not available, the mean between the bid and asked prices as of the date of death, or the nearest date thereto if within a reasonable time thereof, will be accepted as the value.

In the case of the stock of a close corporation, the value shall be determined on the basis of the company's net worth, earning power, and dividend-paying capacity, and all other relevant factors bearing upon the value of the stock. Complete financial and other data upon which the estate bases its valuation should be submitted in duplicate with the return. In the case of the stock of other corporations where the shares are not quoted on a bona fide bid and asked basis and no bona fide sales thereof have been made within a reasonable time of the decedent's death, the value should be determined and supported in the manner indicated in this paragraph.

In the case of corporate or other bonds which are not quoted on a bona fide bid and asked basis and if no bona fide sales thereof have been made within a reasonable time of the decedent's death, the value is to be determined by giving consideration to the

soundness of the security, the interest yield, the date of maturity, and other relevant factors.

In exceptional cases in which it is established by clear and convincing evidence that the value per bond or share of any security determined upon the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, other relevant facts and elements of value will be considered in determining the fair market value. The size of holdings of any security to be included in the gross estate is not a relevant factor and will not be considered in such determination.[13]

* * * * *

[13] This last sentence, which had also appeared in the 1937 Edition of Regulations 80 (in Art. 10 (c)), was dropped from the revision contained in T. D. 4902, 1939–1 Cum. Bull. 325, in which the substance of the other parts of the above-quoted article was restated in slightly different form.

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Supreme Court of the United States

OCTOBER TERM, 1941.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

V.

LEWIS B. MAYTAG, ALTERNATE EXECUTOR OF THE ESTATE OF DENA B. MAYTAG, DECEASED, RESPONDENT.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

V.

ORA B. MAYTAG, FRED MAYTAG II, AND MARY LOUISE MAYTAG McCAHILL, EXECUTORS OF THE ESTATE OF E. H. MAYTAG, DECEASED, RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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STATEMENT.

In order to aid this Court in reaching a correct conception of the case presented, Respondents correct and amplify the statement as to the facts and the question presented, made in the Petition.

The Commissioner determined the value of the blocks of stock involved solely on the basis of the market quotations, as of the valuation dates, of Maytag Common stock on the New York Stock Exchange. He contended before

the Board that the market quotations were exclusively determinative of the fair market value, regardless of the admitted fact that the volume of sales on the stock exchange was relatively small, and that the quantity of stock in the blocks to be valued was relatively large. Consistently with the then existing Treasury Regulations (Reg. 80, 1934 Ed., Art. 13 (3); Reg. 79, 1936 Ed., Art. 19 (3)), he refused to give any consideration whatsoever to the size of the blocks of stock, and asserted before the Board that the size of the blocks of stock was an immaterial matter, and should be given no consideration whatsoever by the Board. While contending, as stated in the Petition, Page 5, that the correct concept of fair market value was "the price at which the property in question would change hands, assuming a willing seller and a willing buyer, i. e., *assuming an increase in demand equal to the supply or the quantity of the property in question*", (Italics ours) nevertheless he insisted that the Board should consider nothing but the quoted market prices on the New York Stock Exchange, and value the blocks of stock for tax purposes accordingly.

The Board accepted as correct the concept that the fair market value was "the price at which the property would change hands, assuming a willing seller and a willing buyer": but refused to arbitrarily "assume an increase in demand equal to the supply or the quantity of the property in question"; rejected the arbitrary formula prescribed by the Regulations for determination of the value of stock for estate and gift tax purposes, and proceeded to reach a determination of the fair market value of the blocks of stock involved by considering all factors and elements relevant and material to the ultimate question.

The taxpayers introduced the testimony of three expert witnesses whose qualifications as experts were unchallenged. Each of these witnesses gave his opinion that the size of the blocks of stock in question was an exceedingly

important factor in determining the price at which the blocks of stock would change hands; for the reason that, as each testified, it would have been impossible to liquidate such blocks on the New York Stock Exchange within a reasonable time without very seriously depressing the market prices; and that the only method of disposing of such large blocks of Maytag Common stock would have been to sell to a syndicate on an "off-market" transaction, at a substantial discount under the market prices. Each of these witnesses stated that the market quotations of Maytag Common stock did not fairly reflect the fair market value of the blocks of stock in question. (Rec. 159, 165, 173-4, 179, 185, 225.)

The Commissioner introduced the testimony of three expert witnesses. Two of them, (Dr. Friday and Mr. Graham) were of the opinion that the market quotations alone were not the only criterion of fair market value (Rec. 206, 249, 268-9, and 289). On cross examination, one of the Commissioner's witnesses (Merriman—Rec. 343-4) stated that the block of 133,859 shares could have been liquidated by careful market proceedings on the New York Stock Exchange within a period of six months after the valuation date, and that the block of 400,000 shares could have been disposed of in probably a year or 15 months. Another of the Commisisoner's witnesses (Graham—Rec. 225) testified that the dumping of large blocks of stock on the market has a tendency to drive the price down.

It thus appears that not only was there substantial evidence to sustain the finding of the Board that the market quotations were not the sole and exclusive criterion by which the fair market value of the blocks of stock in question should be determined, *but that all the evidence sustains the proposition without conflict.* Therefore, the Board felt free to give consideration to all relevant factors and elements bearing on the question of fair market value:

and in approving this procedure of the Board, the lower court said (125 Federal Reporter, Second Series, 55, at 63):

> "Where, as in this case, the taxpayer affirmatively shows that a block of listed stock to be valued is very great in comparison with the amounts of the stock which have been traded in on the exchange where it is listed, that the block of stock could not be sold on such market at its quoted prices within a reasonable time by skilled brokers following prudent practices for liquidation and that the true value of the block of stock is in fact different from the price quotations, then the taxpayer is entitled to have all other proper evidence of the value of the block of stock considered together with the market quotations." (Citing authorities)

* * * * * *

Adverting now to the statement in the Petition on Page 2 under the heading "Question Presented", for the purpose of commenting upon this rather ambiguous statement we quote it and italicize the objectionable phrases and words:

> "In determining for estate and gift tax purposes the value of *large blocks of stock regularly traded* in upon the New York Stock Exchange, the Board of Tax Appeals took into consideration the *potential* reduction in the market price which would result from the *artificially* depressed condition of the market if the blocks of stock were thrown upon the market at one time. The question presented is whether this *potential* effect may properly be considered as a factor in valuing the stock."

It is not true that large blocks of the Maytag Common stock were regularly traded in. The record is conclusive and to the contrary on this point. The volume of monthly and yearly sales during the years 1933, 1934 and 1935, and of daily sales during 1934, is shown in the record and reproduced in the opinion of the lower court (125 Federal Reporter, Second Series, Pages 58, 59 and 60). It is true that Maytag Common stock was more or less regularly traded in, but the volume of the daily, monthly and yearly trad-

ing was exceedingly small compared to the blocks of stock to be valued.

Petitioner uses the phrase "artificially depressed condition of the market". The evidence shows that the depression of the market prices that would follow the dumping of large blocks of stock was anything but artificial.

Petitioner refers to the "potential" effect of the offering of large blocks of stock on the market. We say that under the evidence the effect is not to be characterized merely as potential, but on the contrary as actual.

Respondents do not desire or intend to occupy the time or attention of this Court with a discussion of phraseology, but nevertheless are impelled to say that, taken by itself, the statement in the Petition that the question presented "is whether this potential effect (i. e., the result obtaining if the blocks of stock involved were thrown on the market) may properly be considered as a factor in valuing the stock", is hardly a fair statement of the question presented in these cases, and requires clarification.

The implication of the statement is that the Board determined the value of the stock by an arbitrary discount, following the theory identified by Petitioner as the "blockage theory". This is not the fact, as is readily demonstrated by an examination of the record.

Unquestionably it is true that the Board considered the size of the blocks of stock, and the testimony of the expert witnesses, including the Commissioner's witnesses, to the effect that an attempt to dispose of the blocks of stock on the New York Stock Exchange would result in depressing the market, as justifying its conclusion that the market quotations on the critical dates were not conclusive as determining the fair market value of the blocks of stock involved.

The Commissioner, asserting the Board was wrong in refusing to accept the market quotations as final and con-

clusive on the question of fair market value, asked the lower court to review the decision of the Board on this point alone. The question at issue before the lower court was clearly recognized in the Commissioner's argument, and by the lower court. We quote from its opinion (125 Fed. (2d) at 61):

> "The contention of the Commissioner on this review is that the Board applied an erroneous method resulting in erroneous conclusion that the value of the two blocks of stock was less than the prices at which the stock was regularly bought and sold on the open market of the New York Stock Exchange."

Also from Page 62:

> "In support of his position that the market quotations on the stock made available to the Board constituted 'primary' or 'best' evidence of the value, and that the production of such evidence rendered the opinion and other evidence considered by the Board inadmissible * * *"

And in passing upon the question, the lower court made the statement (opinion Page 63) already quoted on Page 4 of this Brief.

It is not asserted by the Petitioner that the evidence, upon which the Board based its conclusion that the quoted market prices alone should not be held determinative of the fair market value of the blocks of stock involved, was not legally sufficient to sustain the finding of the Board. Petitioner claims merely that the Board should not have given any consideration to such evidence, or to any evidence other than that which established the quoted market prices.

So it appears that the question presented is this:

Did the lower court err in holding that under the circumstances established by the evidence in these cases, the taxpayer is entitled to have all evidence of the value of the stock considered together with the market quotations?

POINTS.

I.

No method of determining fair market value can be stated which will adequately meet all circumstances. Fair market value is a question of fact and all evidence tending to establish it should be considered.

Philips v. Com'r., 12 Fed. (2d) 598.
Helvering v. Safe Deposit and Trust Co., 95 Fed. (2d) 806.

II.

An inflexible mathematical formula promulgated by the Commissioner of Internal Revenue, commanding determination of a question of fact arising under a statute in accordance with the prescribed formula, is not binding on either the Board of Tax Appeals or the Courts: particularly when it is made to appear that the rule of the formula operates in disharmony with the plain intent of the statute, and contrary to the facts.

Helvering v. Safe Deposit and Tr. Co., 95 Fed. (2d) 806.
Manhattan General Equipment Co., 297 U. S., 129, 134; 80 L. Ed. 528.
And see, generally, authorities cited under III and IV, *infra.*

III.

The Board of Tax Appeals found as a fact that the size of the blocks of stock to be valued was an important factor in connection with the determination of the fair market value thereof. There is abundant evidence in the record to support the inference and sustain the finding. In fact, any other conclusion would be contrary to the evidence.

Such a determination of fact supported, by legally sufficient evidence, may not be disturbed by the courts.

Powers Mfg. Co. v. Com'r. (C. C. A. 8), 34 Fed. (2d) 255.
Cass v. Helvering (C. C. A. 8) 83 Fed. (2d) 841.
Helvering v. Kimberly, 97 Fed. (2d) 433.
Com'r v. Shattuck, 97 Fed. (2d) 790.
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Helvering v. Rankin, 295 U. S. 123, 131, 79 L. Ed. 1343, 1349.
Elmhurst Cem. Co. v. Com'r, 300 U. S. 36, 40; 81 L. Ed. 491, 492.
Helvering v. National Groc. Co., 304 U. S. 282, 82 L. Ed. 1347, at 1356-7.
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Randolph et al. v. Commissioner, 76 Fed. (2d) 472.
Palmer v. Commissioner, 302 U. S. 63, 82 L. Ed. 50.
And see annotated cases, 117 A. L. R. 149.

IV.

The procedure and methods followed by the Board in these cases, and approved by the lower court, have been uniformly and unanimously approved by all the Federal Courts that have passed on the question. See, among others,

Helvering v. Maytag, 125 Fed. (2d) 55.
Helvering v. Safe Deposit & Tr. Co., 4 Cir., 95 Fed. (2d) 806.
Bull v. Smith, 2 Cir., 119 Fed. (2d) 490.
Grant Co. v. Duggan, 2 Cir., 94 Fed. (2d) 859.
Commissioner v. Shattuck, 7 Cir., 97 Fed. (2d) 790.
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Richardson v. Helvering, App. D. C., 80 Fed. (2d) 548.
Rogers v. Helvering, 2 Cir., 107 Fed. (2d) 394.
Roth v. Wardell, 9 Cir., 77 Fed. (2d) 124.
Heiner v. Crosby, 24 Fed. (2d) 191.

V.

Upon the merits it seems impossible to justify petitioner's contention that in these cases the market quotations, *as such*, should be held as conclusive in establishing the fair market value of the blocks of stock, notwithstanding that, as has been held, they sometimes normally constitute strong evidence, and in a proper case, could justify the inference that they are determinative.

It is obvious that the market quotations of a stock dealt in on the New York Stock Exchange represent from day to day merely the value of the stock in the minds of the traders. But the traders on a stock exchange are not the ones who are to decide the fair market value of stock for tax purposes. This determination is remitted to the Board of Tax Appeals, in the last analysis. It is true that if a stock is regularly traded in on an exchange, there may arise an assumption that the exchange affords a market wherein there are sufficient willing buyers to purchase the stock that is required to be valued, at the market prices: so, if the evidence does in fact establish that the exchange affords a market upon which the stock could be disposed of at the current market quotations, then obviously the quotations afford the best criterion of value; not because the traders think that the quotations do represent the fair market value, but simply because the fact is then established that the stock can readily be disposed of at the known price; that is, the buying demand equals the supply. On the contrary, and in a case where it is made to appear that the exchange would not present sufficient willing buyers at the

quoted market prices, the quotations surely cannot be held as exclusively determinative of a fair market value, which according to all judicial precedent and common experience and knowledge is a question of fact, and as such to be decided in accordance with the greater weight of all the evidence, and not in accordance with the fluctuating opinions of traders on a stock exchange.

CONCLUSION.

However obliquely the point is approached in the Petition, the fact is that Petitioner is seeking to have this Court declare that in the case of a listed stock the market quotations on the valuation date must be accepted as conclusive and as the sole criterion to be used in determining the fair market value of *all* the stock of that particular issue on the critical date, and that in the case of a listed stock all inquiry as to its fair market value for tax purposes is foreclosed excepting only the ascertainment of the market prices on the exchange that the stock is principally dealt in.

In its practical application, the proposition for which the Commissioner contends means that, because on a certain date 100 shares of the stock in question is sold on the New York Stock Exchange at a certain price per share, any number of shares could be disposed of on that same day *and at the same price.* In short, that without exception it must be assumed that always there will be an increase in buying demand sufficient to absorb the quantity of the stock, however great, that is offered for sale.

This, indeed, is a violent assumption, quite contrary to common knowledge and experience, and certainly, in these cases, contrary to all the evidence.

It is an assumption that the Board of Tax Appeals has consistently refused to entertain: and every court that

has passed upon the question during the period of for more than twenty years has affirmed the position of the Board, nor has the Board or any court ever held to the contrary, so far as we can ascertain. Notwithstanding, Petitioner contends here (Pet., Page 12) that "in valuing a large block of stock, therefore, *it must be assumed that there is a demand for that stock equivalent to its supply.*" (Italics ours.)

Respondents concede that the market quotations of a listed stock may normally justify the presumption (rebuttable, of course) that they establish its fair market value; and that whether or not such quotations are accepted as conclusive, they are always a factor to be considered. Respondents also concede that the determination of the value of stock for estate or gift tax purposes by the Commissioner raises a presumption (also rebuttable), of validity. Respondents also concede that the true measure of "fair market value" of property is the price in money at which such property would change hands in a transaction between a willing buyer and a willing seller. The ultimate question is always, for how much money can the property be disposed of?

No one would deny that where it is established, *as a fact,* that the quantity of property to be valued could readily be sold at an ascertained price, that price is at least the minimum to be set as the fair market value. So where it is made to appear that the quantity of stock involved could be readily disposed of on the exchange at the quoted prices; or, perhaps to state it more correctly, *where it is not made to appear that the stock could not be disposed of at the quoted market prices,* then the market prices should be held controlling, at least as indicating the minimum fair market value.

But the corollary proposition is equally sound: that is, where it is made to appear that the stock to be valued *cannot* be disposed of at the quoted market prices, then certainly those prices are not conclusive as determining the minimum fair market value.

It is true, as stated in the Petition under Point 4, Page 13, that the Board's final determination of value was made upon all the evidence and that the final determination of values was not based on the proposition that the value of the block of stock should be arbitrarily discounted because of the so-called "blockage theory". The evidence as to the fair market value of the stock is voluminous and covers a very wide and complete field of investigation. It would serve no useful purpose and would doubtless be improper to detail that evidence here. It is in the record and it was carefully examined by, and is restated in the opinion of the court below. The final determination of values was based upon and is abundantly sustained by the evidence as to value; and was not, as apparently petitioner would have this Court believe, based merely on some arbitrary "blockage" discount. As previously pointed out, the refusal of the Board to accept the market quotations as conclusive had nothing whatever to do, directly, with the final determination of values.

Having rejected the contention of the Commissioner, that the market quotations are to be taken as conclusive, regardless of substantial evidence rebutting that assumption, and that the quantity of the stock to be valued should be given no consideration, the Board felt free, and was free to give consideration to all relevant factors, including, of course, the market quotations themselves. So far as the opinion evidence is concerned, the testimony of the witnesses developed a range, as to value, of from approximately $2.00 per share up to $5.00. Final figures of valuations as fixed by the Board were well within this range.

We direct the attention of the Court to the fact that in these cases there is no complaint concerning the value for tax purposes of the blocks of stock involved or concerning any other action of the Board, excepting only that it gave consideration to the testimony establishing the size of the blocks of stock as a relevant factor.

Neither is it claimed by Petitioner that there is any conflict in the decisions of the Circuit Courts of Appeal that have passed upon the question. Indeed, such a claim could not well be made and certainly could not be supported, because it would be contrary to the facts. Petitioner barely hints, not that there is a conflict, but that there is "confusion" resulting from the decisions in the cases referred to under Paragraph (2) commencing Page 9 of the Petition. But an examination of the opinions in those cases fails to sustain any slight aspect of confusion among the Circuit Courts of Appeal. Consideration by the Board of Tax Appeals of the size of the block of stock to be valued was by implication, at least, and perhaps definitely approved in the *Phipps* case and in *Gamble vs. Commissioner, Roth vs. Wardell,* and *Richardson vs. Helvering,* referred to in the Petition, Page 10. With reference to these cases, Petitioner states "while perhaps no square conflict exists between these cases and the decision of the court below, it is submitted that they cannot be reconciled in principle. If the blockage theory is valid at all, it would seem that it must be applied in all cases where the block of stock is sufficiently large to make it likely that its immediate disposition would depress the market. * * *"

Comparison of the opinions in the cases referred to by Petitioner, with the opinion of the lower court in these cases and with the opinions of the other Circuit Courts dealing with the question, will, indeed, establish that there is no conflict. In the *Gamble, Roth* and *Richardson* cases, the

court simply held that although it was proper for the Board to consider the size and quantity of the blocks of stock to be valued, and the opinion evidence to the effect that the attempted disposition of these blocks would depress the market, nevertheless the courts approved the action of the Board in refusing to be bound by such testimony where, in the opinion of the Board, the weight of the testimony justified another conclusion.

It is idle to argue, as Petitioner does, that what he terms to be the "blockage theory" must always be applied by the Board, or that it is a method of proof that it is always to be considered conclusive. As stated in *Phillips vs. Commissioner, supra,* "No method of determining fair market value can be stated which will adequately meet all circumstances." And as stated by the Circuit Court of Appeals, 4th Circuit in *Helvering vs. Safe Deposit and Trust Company,* whether or not the size of the block of stock affects value is a matter of evidence and not of doctrinaire assumption.

Respondents do not claim and never have claimed that the Board of Tax Appeals must consider the size of a block of stock as a controlling factor. Respondents do contend that where there is competent evidence before the Board, sustaining the proposition that the size of a block of stock to be valued is a relevant factor, that in such a case the Board should give consideration to the fact, although always the weight or value of the fact and the inferences to be drawn therefrom are solely for the Board to determine.

* * * * * *

For the reasons stated and upon the authorities cited in this Brief it is respectfully submitted that the Petition for Writs of Certiorari should be denied.

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